No. 95-1099

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

BARRON J. RUSSELL and NANCY H. RUSSELL,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION as Conservator for First American Savings Bank,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether actions taken in violation of 11 U.S.C. § 362 are void *ab initio* and thus a legal nullity, or merely voidable.

2. In the event that actions taken in violation of the automatic stay are voidable, or if the automatic stay can be retroactively annulled under 11 U.S.C. § 362(d), what is the standard or appropriate parameters of analysis for voidability or retroactive annulment, and have those standards been properly employed.

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Petitioners Barron J. Russell and Nancy H. Russell respectfully pray that a writ of certiorari be issued to review the per curium decision of the United States Court of Appeals for the Eleventh Circuit issued in the above proceeding on July 10, 1995.

OPINIONS BELOW

Neither the decision of the United States District Court, nor the July 10, 1995 decision of the United States Court of Appeals for the Eleventh Circuit are reported. The decision denying rehearing is reported at 62 F.3d 401 (Table) (11th Cir. 1995).

The decision of the United States Bankruptcy Court is reported at 156 B.R. 347 (N.D. Ga. 1993).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on July 10, 1995. (App. B.p. 2a). The petition for rehearing and suggestion of rehearing en banc was denied on September 6, 1995. (App. A, p. 1a). On November 22, 1995 Justice Kennedy extended the time to file this petition to and including January 5, 1996. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). As a matter arising under Title 11 of the U.S.C., original jurisdiction was in the United States Bankruptcy Court, and the United States District Court acted as an appellate court. Thenceforth, the matter proceeded to the United States Circuit Court as an appeal of a final order of a United States Bankruptcy Court pursuant to 28 U.S.C. § 158(d) following final action on an appeal by a United States District Court.

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. § 362(d).

STATEMENT OF THE CASE

The *In re Russell Corporation* Chapter 11 proceeding was commenced on or about March 2, 1990. On July 10, 1990, First American Savings Bank, F.S.B. ("First American") filed with the trial court a motion for relief from the automatic stay injunction in effect under 11 U.S.C. § 362. First American held a first priority security interest in certain real property located at Peachtree Industrial Boulevard and North Berkeley Road in Gwinnett County, Georgia (the "Property"). Following a hearing on First American's motion for relief, a consent order was entered providing that the automatic stay would remain in effect as to the Property pending "strict compliance" by the debtor on terms agreed to between the parties.

Due to a failure of the debtor to comply with the consent order entered pursuant to First American's motion for relief, an order was entered by the Bankruptcy Court on March 10, 1992, granting First American relief from the stay as to the Property. The terms of the order provided as follows:

> . . . First American Savings is granted relief from the automatic stay with respect to the property securing its claim, said property being described in the Motion, to advertise, foreclose upon and to exercise all other remedies with respect to said property to which it is entitled under applicable law.

(App. D, p. 2a).

For reasons unknown to Russell, First American did not pursue foreclosure proceedings as to its collateral in July, August, or September of 1992. However, on September 29, 1992, Ross P. Kendall, Esq. entered an appearance as attorney of record on

behalf of the Resolution Trust Corporation, as conservator for First American Federal Savings Bank. Apparently, the Resolution Trust Corporation (RTC) took over management of First American prior to September of 1992, and the RTC acquired new counsel to replace the attorneys who theretofore had represented First American.

Following the entry of appearance by Mr. Kendall, matters moved more swiftly as to the Property. In November of 1992, the Property was advertised for foreclosure in the paper of record for Gwinnett County, Georgia, and a foreclosure sale took place on December 1, 1992. The RTC was the highest bidder on the Property. Thereafter, on December 30, 1992, the RTC filed a, "Report of Sale and Application for Confirmation Sale Under Power," pursuant to the terms of O.C.G.A. § 44-14-161, *et seq.* Named as respondent in the action in the Superior Court of Gwinnett County were the debtor, and Nancy H. Russell and Barron J. Russell — Ms. and Mr. Russell being guarantors on the note which was secured by the Property.

Although the RTC was clearly aware of the existence of the bankruptcy proceeding (as indicated by Mr. Kendall's notice of appearance filed in the bankruptcy case in September), the RTC declined to obtain relief from the automatic stay in order to file the confirmation suit.[1]

In February of 1993, Mr. and Ms. Russell retained counsel for purposes of the confirmation action in the Superior Court of

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1. The RTC stated before the trial court that it was never seeking to collect against the debtor itself when it violated the stay. However, the RTC did not in fact actually agree to forego collection proceedings against the debtor until the April of 1993 motion for relief. (App. D, p.3a). At the time the confirmation law suit was filed in Gwinnett County, Georgia, it was served on the debtor's corporate registered agent, and contained no indication that it was not seeking collection against the debtor.

Gwinnett County. After review of the appropriate bankruptcy court records, counsel for Russell discovered that relief from the automatic stay was never obtained so as to allow the RTC to proceed with a confirmation action following foreclosure of the Property. Upon discovery of this fact, counsel for the Russells forwarded a February 18, 1993, correspondence advising the RTC that the confirmation action was clearly in violation of the automatic stay. Additional written correspondence was forwarded by counsel for the Russells on February 22 reiterating the Russells' position that the confirmation action was brought in violation of the automatic stay and contrary to specific published case law in the Northern District of Georgia. Following the February 22, 1993 letter, the Russells filed a Plea in Abatement in the confirmation suit pending with the Superior Court of Gwinnett County.

On March 5, 1993, the Russells were informed that the RTC had again procured new counsel in the bankruptcy and its related proceedings. The RTC's new counsel requested a continuance of the hearing scheduled in the Superior Court of Gwinnett County on the Russells' Plea in Abatement, which continuance was consented to by Russell. Although counsel for Russell believed the RTC would proceed to petition the bankruptcy court for relief from the automatic stay so as to allow the confirmation suit to proceed, the appropriate relief was never requested. Instead, a hearing on the Russells' Plea in Abatement was set for March 31, 1993, in the Superior Court of Gwinnett County.

The Superior Court of Gwinnett County declined to rule on any substantive matters before it, pending the RTC being given the opportunity to file appropriate motions with the bankruptcy court. Therefore, it was at the insistence of the Superior Court of Gwinnett County that the RTC finally on April 15, 1993 filed a motion for relief seeking annulment of the automatic stay so as to retroactively validate the confirmation suit filed on December 30, 1992. The subsequent proceedings led to the instant writ.

REASONS FOR GRANTING THE WRIT

The decision affirmed by the Court of Appeals in this case appears to be in direct conflict with a prior decision of that court, *In re Albany Partners*, 749 F.2d 670 (11th Cir. 1984).

The question raised in this petition is thus of great importance to the bench, bar and litigants in the Eleventh Circuit.

I.

THE APPEALS COURT DECISION APPEARS TO CONFLICT WITH DECISIONS OF THE ELEVENTH CIRCUIT, AND PRESENTS AN ISSUE IN WHICH COURTS OF APPEALS HAVE SPLIT.

The leading cases holding that actions taken in violation of the automatic stay are void, as opposed to voidable, are *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994); *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *In re Calder*, 907 F.2d 953 (10th Cir. 1990); *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427 (2nd Cir. 1987), *cert. denied sub nom., Rockefeller Group, Inc. v. 48th Street Steakhouse, Inc.*, 485 U.S. 1035 (1988); *Matthews v. Rosene*, 739 F.2d 249 (7th Cir. 1984); *In re Smith Corset Shops, Inc.*, 696 F.2d 971 (1st Cir. 1982). All of these cases hold that an action taken in violation of the automatic stay is a legal nullity, thus agreeing with the position staked out by the Eleventh Circuit in 1984 in *In re Albany Partners*, 749 F.2d 670,675 (11th Cir. 1984). In the case at bar there is no question that all parties agree that the actions taken by the RTC were violative of the federal injunction imposed by 11 U.S.C. § 362. The violation of the stay issue was not even appealed by the RTC.

The confirmation suit filed by the RTC in violation of the automatic stay is therefore simply a nullity, and of no effect. In

order to render it effective the RTC must dismiss the action deemed a legal nullity within the Eleventh Circuit, and bring an action in compliance with established law.

The Federal Circuit level cases opposing what is clearly a majority rule are found in *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993) and *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989). The Fifth Circuit in *Sikes* considered the conflict between the circuits and held that, ". . . the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. We agree that the characterization of every violation of Section 362 as being absolutely void is inaccurate and overly broad." *Id.* at 178. The *Sikes* court reached this decision by holding that the apparently binding precedent in *Kalb v. Feuerstein*, 308 U.S. 433 (1940) was distinguishable. The Fifth Circuit distinguished *Kalb* on the basis that in 1940 bankruptcy referees had the express statutory power *only* to modify or terminate the automatic stay. That is, the power to annul the stay, found by the *Sikes* court in 11 U.S.C. § 362(d), did not exist.[2]

The *Easley* decision, while endorsing "voidability", merits close scrutiny because of its remarkably lucid reasoning. Discarding the artificialties unquestionably derivative of trying to distinguish and define "void" versus "voidable", the court reviewed all of the applicable caselaw and found that the term "invalid" was far more helpful. *Easley* at 909. The *Easley* court then noted that even those decisions holding actions as purely void, employed what the Sixth Circuit termed "equitable

2. Other courts have not found discarding the Supreme Court decision in *Kalb v. Feuerstein* as easy. *See, e.g., In re Schwartz*, 945 F.2d 569, 572 (9th Cir. 1992); *Maritime Electric Company v. United Jersey Bank*, 959 F.2d 1194, 1206 (3rd Cir. 1991); *Ellis v. Consolidated Diesel Electric Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984); *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 976 (1st Cir. 1982).

exceptions to the operation of the stay" to retroactively annul the stay pursuant to the authority of 11 U.S.C. § 362(d). *Easley* at 910. Therefore, the *Easley* court held that "actions taken in violation of the stay are invalid and voidable and shall be voided absent certain limited equitable circumstances." *Id.* at 911.

While not addressed in *Easley*, the position set forth by the Eleventh Circuit in *Albany Partners* might be better analyzed as allowing the granting of retroactive relief and annulment under 11 U.S.C. § 362(d) in accordance with certain equitable principles. Certainly at least one bankruptcy judge has reached this conclusion regarding the *Albany Partners* decision. *See In re Lipuma*, 167 B.R. 522, 526 (Bank. N.D. Ill. 1994). Trial court judges within the Eleventh Circuit, however, have not struggled in finding improper actions as void. For example, this exact issue was recently commented upon by the Honorable W. Homer Drake in the 1994 decision of *Matter of Growth Development Corp.*, 168 B.R. 1009 (Bank. N.D. Ga. 1994), in which the court held that:

> The law within the Eleventh Circuit is well-settled that any acts taken in violation of the automatic stay are void *ab initio* and have no effect.

Id. at 1013.

If the rule in the Eleventh Circuit does recognize equitable exceptions to the void *ab initio* rule, those equitable circumstances are not present in this case, and the bankruptcy court's decision to annul the stay and grant retroactive relief was clearly erroneous, and the subsequent affirmations of the trial court's ruling have been erroneous. Specifically, in the case at bar there are available to the RTC no recognized, or even imaginable, equitable exceptions. The facts demonstrate without dispute that the RTC had knowledge of the bankruptcy and the need to gain

relief from the stay in order to proceed with a confirmation suit.[3] Without the RTC having the existence of the stay hidden from it, or at least being ignorant regarding the existence of the injunction, the primary recognized exception(s) to the "void ab initio" position[4] is eliminated from consideration.

The sole credible argument advanced by the RTC is that the reliance by Russell, a non-debtor, on the automatic stay violation as nullifying the confirmation suit is an unfair "use of the stay" so as to force an unfavorable result upon the RTC. *See Easley*, 990 F.2d. at 911. While this argument has a certain superficial appeal

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3. Substantial evidence is present indicating the RTC had knowledge that relief from the automatic stay was necessary after the December 1, 1992 foreclosure before proceeding with the confirmation action. Specifically, the law firm that represented the RTC in December of 1992, as indicated in Mr. Ross Kendall's notice of appearance filed with the trial court in September, was previously involved in litigation regarding precisely this same issue. As set forth to the lower courts, the RTC was therefore aware of the unpublished case of *In re Maitland Grove, Inc.*, Case No. A90-15732, unpublished decision (January 8, 1992, Bank. N.D. Ga.). (App. E.) The *Maitland Grove* decision's facts indicate that a lender represented by Mr. Kendall's firm proceeded with a confirmation sale as to certain collateral without first getting the specific relief from the stay so as to proceed with that type of judicial action. Faced with facts remarkably similar to that before this Court, Mr. Kendall's firm sought unsuccessfully to distinguish certain published case law. The *Maitland Grove* Court discarded all attempts by Mr. Kendall's firm to prove the published cases as non-persuasive, and sanctioned the lender in question. Therefore, at the time Mr. Kendall entered an appearance on behalf of the RTC in September of 1992, the RTC had many months to proceed with requesting relief from the stay with full knowledge of the consequences for not doing so. The RTC's solution to addressing the stay violation, which was still not acknowledged even after it was squarely brought to the RTC's attention in February of 1993, was not to file for appropriate relief, but instead to terminate Mr. Kendall! In addition, the RTC still did not file a request for relief for three more months, and then only did so after being told to file for relief by the Superior Court Judge.

4. *See Easley*, 990 F.2d at 911; *In re Lipuma*, 167 B.R. at 526.

(although ignoring the fact that the situation at bar has been created solely by the RTC, and not in any sense by a "use of the stay" by Russell), it cannot withstand scrutiny.

The situation in the case at bar cannot correctly be characterized as an example of a creditor being victimized. Full knowledge of the existence of the injunction and how to (quite easily in light of the substantial resources available in this case to the RTC) legally circumvent the injunction were available to the RTC for several months before it even foreclosed on the Property that led to the confirmation suit. Russell exercised no chicanery or perfidy, and sought only that the RTC properly exercise its legal remedies. It was solely the decision of the RTC to not request relief from the automatic stay before the foreclosure of the Property, or after the foreclosure, or when the confirmation suit was filed, or when the problem was brought to its attention in February of 1993. The RTC refused to take appropriate action in the Bankruptcy Court, a procedure it well knew to be mandatory, until compelled to do so by a state court judge.

The position of the RTC in the matter at bar is directly analogous to that of the offending creditor in *Franklin Savings Association v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994). The creditor in *Franklin*, like the RTC, sought retroactive relief and a "now for then" order. Like the RTC, the *Franklin* creditor had deliberately gambled by knowingly violating the stay. Under these identical circumstances, the Tenth Circuit declined to grant relief to an offending creditor who violated the stay with full knowledge of the stay's existence and, like the RTC, knowledge of how to proceed correctly in light of the injunction.[5]

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5. The Tenth Circuit also concluded that the equitable exception apparently sought by the RTC is only available under the Eleventh Circuit's caselaw if an offending creditor committing the RTC's actions was honestly ignorant of the stay's existence. *Franklin Savings*, 31 F.3d at 1023.

Russell contends that any actions taken in violation of the automatic stay in effect under 11 U.S.C. § 362 are clearly and unarguably void. This being the case, the confirmation suit brought by the RTC without permission from the bankruptcy court was a nullity, and must be dismissed as void and then re-filed.

Russell contends that any retroactive annulment of the automatic stay under 11 U.S.C. § 362(d) must fall within certain parameters. These parameters are defined by clearly delineated equitable exceptions. These exceptions principally involve lack of notice to the offending party of the existence of the automatic stay, or at least some reasonable belief that the offending party did not have knowledge of the injunction in effect. Any other equitable exception allowing retroactive annulment of the stay must involve an unfair and inequitable use by the party receiving the stay's protection, combined with clean hands on the part of the offending party.

In the case at bar Russell contends that the exceptions (if any) to the void *ab initio* rule in effect in the Eleventh Circuit cannot be met. Clearly, the offending party had many months of notice as to the injunction in effect, and was well aware of the need to gain relief from that injunction before proceeding with the confirmation suit. While the RTC undoubtedly claims that Russell's use of the stay is unfair and inequitable, an equitable exception to the void *ab initio* rule cannot be relied upon by the RTC in light of its deliberate and calculated flouting of the need to gain relief from the automatic stay. Russell concedes that retroactive annulment would probably have been available within an equitable exception at certain points in the RTC's history regarding the Property. However, in the case at bar the RTC proceeded with unclean hands in attempting to apply for retroactive relief many months after becoming aware of the need to do so. While the protections of the automatic stay are therefore

being enjoyed by a non-debtor entity, that protection is due to the actions of the RTC, and not to Russell.

CONCLUSION

For the reasons set forth above, the Petitioners ask that this Court issue an order reversing the order of the United States Court of Appeals.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 6, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8378

IN RE:

RUSSELL CORPORATION,

Debtor.

BARRON J. RUSSELL, NANCY J. RUSSELL,

Plaintiffs-Appellants,

versus

RESOLUTION TRUST CORPORATION, RUSSELL CORPORATION,

Defendants-Appellees,

ROBERT BRIZENDINE,

Trustee.

On Appeal from the United States District Court
for the Northern District of Georgia

Appendix A

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _____ F.2d _____).

Before: EDMONDSON, COX and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 10, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[DO NOT PUBLISH]

No. 94-8378
Non-Argument Calendar

D. C. Docket No. 1:93-cv-1872-JTC

IN RE: RUSSELL CORPORATION,

Debtor.

BARRON J. RUSSELL, NANCY H. RUSSELL,

Plaintiffs-Appellants,

versus

RESOLUTION TRUST CORPORATION,
RUSSELL CORPORATION,

Defendants-Appellees,

ROBERT BRIZENDINE,

Trustee.

Appeal from the United States District Court
for the Northern District of Georgia

(July 10, 1995)

Before EDMONDSON, COX and BLACK, Circuit Judges.

Appendix B

PER CURIAM:

Barron J. Russell and Nancy H. Russell appeal the district court's order affirming the bankruptcy court's order granting Appellee Resolution Trust Corporation's motion for retroactive relief from the automatic stay under 11 U.S.C. § 362(d). After review of the record, we affirm for the reasons stated in the bankruptcy court order, entered June 29, 1993, and the district court order, entered February 23, 1994.

AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FILED FEBRUARY 23, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.
1:93-CV-1872-JTC

Bankruptcy Case
No. 90-02881-ADK

In re: The Russell Corporation, Debtor

Resolution Trust Corporation, as Conservator for First American Savings Bank, F.S.B.,

Movant/Appellee,

v.

The Russell Corporation,

Respondent.

Barron J. Russell and Nancy H. Russell,

Intervenors/Appellants

ORDER

This order concerns an appeal of a ruling by United States Chief Bankruptcy Judge A.D. Kahn of the Northern District of Georgia, providing retroactive relief from the automatic stay under 11 U.S.C. § 362(d).

Appendix C

On March 2, 1990, the Russell Corporation ["Debtor"] filed a voluntary petition for Chapter 11 relief. At the time, First American Savings Bank, F.S.B. ["First American"] held a mortgage on a piece Debtor's real property [the "Property"]. The Intervenors personally guaranteed the mortgage.

On March 10, 1992, after a default by Debtor, the Bankruptcy Court gave First American relief from the automatic stay for the purpose of foreclosing on the Property. The court appointed a Chapter 11 trustee for the debtor on October 26, 1992.

On December 1, 1992, Movant Resolution Trust Corporation ["RTC"], as First American's receiver, foreclosed on the property. The RTC itself was the high bidder. The RTC then applied for confirmation of the foreclosure sale in the Superior Court of Gwinnett County, Georgia. In that action the RTC named as respondents both the Debtor and the Intervenors: Under Georgia law, a confirmation proceeding is a prerequisite for obtaining a deficiency judgment against a debtor or guarantor for any debt not covered by the foreclosure. *See* Ga. Code Ann. § 44-14-161(a) (Michie 1982).

Intervenors asserted that the automatic stay was still in effect. The Superior Court accordingly stayed the confirmation action until the Bankruptcy Court lifted the bankruptcy stay.

Eventually, on April 15, 1993, the RTC filed its motion for relief from the automatic stay retroactive to the date of the confirmation action, so that the Superior Court action could proceed. The RTC stated that it did not intend to go after Debtor for any deficiency. Debtor did not oppose the RTC's motion. Intervenors, as guarantors of the debt, did.

Appendix C

The bankruptcy court ruled that filing a confirmation action violated the stay. This is not contested on appeal. However, the court went on to grant the RTC a retroactive annulment of the stay to validate the confirmation proceedings. Intervenors argue that the court lacked authority to provide such retroactive relief, or, if it had such authority, applied it incorrectly on the facts of this case.

Bankruptcy courts in this Circuit appear to have the authority to grant retroactive relief from automatic stays under *Albany Partners, Ltd. v. Westbrook (In re Westbrook)*, 749 F.2d 670 (11th Cir. 1984). In that case, the Eleventh Circuit stated, "[W]e hold that § 362(d) permits bankruptcy courts, in appropriately *limited* circumstances, to grant retroactive relief from the automatic stay." *Id.* at 675 (emphasis in original). Given this, the relief granted in this case was appropriate for the reasons given by the court below. Congress meant the automatic stay to protect bankrupt debtors, not to allow solvent guarantors to avoid their obligations. Appellants' nebulous allegations of RTC misconduct do not undermine the logic of this decision.

The decision of the Bankruptcy Court is therefore AFFIRMED.

SO ORDERED, this 22 day of Feb., 1994.

s/ Jack T. Camp
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA FILED JUNE 29, 1993

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CASE NUMBER
A90-02881-ADK

IN THE MATTER OF:

THE RUSSELL CORPORATION,

Debtor.

RESOLUTION TRUST CORPORATION, as Conservator for First American Savings Bank, F.S.B.,

Movant,

v.

THE RUSSELL CORPORATION,

Respondent,

BARRON J. RUSSELL and NANCY H. RUSSELL,

Intervenors.

IN PROCEEDINGS UNDER CHAPTER 11
OF THE BANKRUPTCY CODE

Appendix D

MEMORANDUM OF OPINION

The above-styled Chapter 11 bankruptcy case is before the Court on a Motion for Relief From the Automatic Stay filed by Resolution Trust Corporation, as Conservator for First American Savings Bank, F.S.B. ("Movant") in which it seeks the entry of an order granting relief from the automatic stay *nunc pro tunc*. Barron J. and Nancy H. Russell ("Intervenors") filed a Motion to Intervene in Movant's Motion. A hearing on these matters was held on May 20, 1993, after which the Court took the matters under advisement and directed the Parties to file briefs addressing the legal issues arising therein. The Court finds these matters to be core proceedings within the meaning of 28 U.S.C. § 157(b)(2). After considering argument of counsel, the Court now makes the following findings of fact and conclusions of law.

The following facts are not in dispute. On March 2, 1990, the Russell Corporation (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. At the time the petition was filed, First American Savings Bank, F.S.B. ("First American"), predecessor of Movant, held a first priority security interest in certain property owned by the Debtor located at Peachtree Industrial Boulevard and North Berkley Road in Gwinnett County, Georgia (the "Property"). On July 10, 1990, First American moved for relief from the automatic stay. A consent order (the "Consent Order") was entered on August 7, 1990 which, *inter alia*, required strict compliance on the Debtor's obligation to make payments to First American under the Consent Order.

The Debtor subsequently defaulted under the Consent Order, and, on March 10, 1992, an Order was entered granting to First American relief from the automatic stay (the "Relief From Stay Order"). The Relief From Stay Order provided, *inter alia*, that

Appendix D

> First American Savings is granted relief from the automatic stay with respect to the property securing its claim, said property being described in the Motion, to advertise, foreclose upon and to exercise all other remedies with respect to said property to which it is entitled under applicable law.

Relief From Stay Order at 2. A Chapter 11 trustee (the "Trustee") was appointed for the Debtor on October 26, 1992.

On December 1, 1992, Movant foreclosed on the Property, The Resolution Trust Company was the highest and best bidder at the foreclosure sale. Movant then filed an application for confirmation of the foreclosure sale in the Superior Court of Gwinnett County, Georgia (the "Confirmation Action") naming as respondents in that action the Debtor and Intervenors, as guarantors of the debt. A Plea in Abatement was filed in the Confirmation Action. It is unclear from the record before the Court which of the respondents in the Confirmation Action actually field the Plea of Abatement.[1] The Superior Court subsequently stayed the Confirmation Action and directed Movant to seek relief from the stay in this Court to go forward with the proceedings before it.

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1. In their brief, Respondents state that they filed the Plea in Abatement. Respondents' Brief at 4. However, Movant states in its brief that it was the Debtor and Barron J. Russell who filed the Plea in Abatement. Movant's Brief at 4. As will be discussed below, the Trustee does not oppose the instant Motion for Relief From the Automatic Stay, therefore, it is somewhat surprising that he would have participated in filing the Plea in Abatement in the Confirmation Action. Of course, the Trustee, as the representative of the Debtor's estate, is the only one who can act on behalf of the Debtor. *See* § 323(a). Therefore, unless the Trustee consented to the Debtor's being named as a moving party in the Plea in Abatement, filing it in the name of the Debtor would have been in error and of no effect as to the Debtor.

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In its Motion, Movant states that it named the Debtor as a respondent in the Confirmation Action "strictly for purposes of compliance with O.C.G.A. § 44-14-16, *et seq.* and the Movant does not intend to seek a deficiency judgment against the Debtor." Motion for Relief From the Automatic Stay at 2, ¶ 7. At the hearing on May 20, 1993, the Trustee stated that he had no objection to Movant's Motion. Therefore, this is simply a contest between a mortgage holder and guarantors in which the Debtor's estate has no interest.

The Court must first consider the Motion to Intervene. The Court notes that Intervenors move to intervene pursuant to Fed. R. Bankr. P. 7024. The Motion for Relief From the Automatic Stay under consideration is a contested matter pursuant to Fed. R. Bankr. P. 9014. Rule 9014 incorporates certain rules contained in Part VII of the Federal Rules of Bankruptcy Procedure, which are applicable to adversary proceedings. However, Fed. R. Bankr. P. 7024 is not one of those rules. The appropriate authority for seeking to intervene in a contested matter is Fed. R. Bankr. P. 2018. *See* Advisory Committee Note to Fed. R. Bankr. P. 7024. Although the Motion to Intervene does not cite this Rule, the Court will construe the Motion to request relief under Rule 2018(a).

> Rule 2018(a) provides as follows:
>
> Permissive Intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

The Advisory Committee Note indicates that Rule 2018 was

intended to implement §§ 1109 and 1164 of the Bankruptcy Code. Section 1109(b) provides that

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

In order to establish cause under Fed. R. Bankr. P. 2018(a), a party must establish that it has an economic or similar interest in the matter which is not adequately represented and that intervention would not result in undue delay or prejudice. *In re Torrez*, 132 B.R. 924 (Bankr. E.D. Cal. 1991). The Court finds that Intervenors have shown sufficient cause under Rule 2018(a). Therefore, the Court concludes that the Motion to Intervene should be granted so that Intervenors may be heard on the Motion for Relief From the Automatic Stay.

Intervenors contend that Movant violated the automatic stay of § 362 by filing the Confirmation Action. They assert that the Relief From Stay Order did not include relief to seek a confirmation of the foreclosure sale. To support this contention, Movants rely heavily upon the case of *Bank of America Nat'l Trust and Sav. Ass'n* (*In re Virginia Hill Partners I*), 110 B.R. 84 (Bankr. N.D.Ga. 1989)(Cotton, J.).

In *Virginia Hill Partners I*, the secured creditor had obtained relief from the automatic stay in an order which provided that

> the automatic stay under 11 U.S.C. § 362 is lifted to allow Bank of America to assert its

> rights against Debtor's property under applicable law, including, without limitation, the right to foreclose upon the Debtor's unsold residential condominium units . . .

110 B.R. at 85. The court found that a confirmation action is subject to the automatic stay and that, "unless the stay relief order clearly provides otherwise, the determination and allowance of claims, deficiency or otherwise, against the debtor or its estate in the pending bankruptcy case remain within the exclusive jurisdiction of the bankruptcy court." *Id.* at 87.

This Court agrees with the holding and reasoning of *Virginia Hill Partners I*. An action to confirm a foreclosure sale, which is a prerequisite under Georgia law to obtaining a deficiency judgment, clearly falls under those actions prohibited by § 362(a).[2] If a creditor intends to seek a deficiency judgment against a debtor in the event the foreclosure sale brings less than the amount of the debt, it is not unreasonable to require specific

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2. Section 362(a) provides, in part, that the filing of a bankruptcy petition acts as a stay of

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

language in the relief from stay order to the effect that, in addition to conducting a foreclosure sale, the stay is also lifted to allow the creditor to file a confirmation action and seek a deficiency judgment against the debtor. Therefore, the court finds that the Relief From Stay Order did not permit Movant to file the Confirmation Action. Thus, Movant's filing of the Confirmation Action violated the automatic stay.

However, this conclusion does not end the inquiry in the matter *sub judice*. There is a crucial factual difference between the proceeding before the Court and the proceeding in *Virginia Hill Partners I*. In *Virginia Hill Partners I*, it was the debtor which was seeking to enforce the automatic stay in order to contest the validity of the confirmation action. Here, the Debtor, through the Trustee, has no objection to the relief sought by Movant. Furthermore, as Movant is not seeking to obtain a deficiency judgment against the Debtor's estate, there is no impact upon the estate.

Congress intended the automatic stay of § 362 to protect the debtor, property of the estate, and property of the debtor. *See Advanced Ribbons and Office Products, Inc. v. U.S. Interstate Distributing, Inc.* (*In re Advanced Ribbons and Office Products, Inc.*), 125 B.R. 259 (Bankr. 9th Cir. 1991). It was not designed to benefit third parties, except to the extent that third parties benefit generally from the preservation of assets of the debtor. Unlike in Chapters 12 and 13, Congress did not enact a codebtor stay in Chapters 7 and 11. In noting the lack of a codebtor's stay, the court in *Virginia Hill Partners I* stated that "[a]bsent such a provision, it seems apparent Congress did not intend, and this court should not permit, the bankruptcy process to frustrate legitimate creditor claims against third parties not before the court." 110 B.R. at 88. *See also*, *In re Kirby*, 151 B.R. 463, 465

(Bankr. M.D. Tenn. 1992); *In re Torrez*, 132 B.R. 924, 944 (Bankr. E.D. Cal. 1991).

In the proceeding *sub judice*, Intervenors are attempting to use the automatic stay to shield them from liability under their guaranty. They are the only ones who will benefit from the enforcement of the automatic stay. The Court concludes that this is not how Congress intended § 362 to be used. If the Debtor had sought to enforce the automatic stay, of if Intervenors could demonstrate that the Confirmation Action will have an impact upon the Debtor's estate, the result here would be different.

Section 362(d) empowers this Court to grant relief from the automatic stay by "terminating, annulling, modifying, or conditioning" the stay. The Court finds that it is appropriate under the circumstances of this proceeding to annul the stay so that commencement of the Confirmation Action is not, and was not, affected by the automatic stay.

In summary, the Court has concluded that Movant violated the automatic stay by filing the Confirmation Action. However, because Movant is not seeking a deficiency judgment against the Debtor or its estate and because the Trustee has no objection on behalf of the Debtor to the relief requested, the Court has concluded that annulment of the stay is appropriate.

An appropriate Order is entered contemporaneously herewith.

At Atlanta, Georgia, this 25th day of June, 1993.

s/ A.D. Kahn
A.D. KAHN
UNITED STATES
BANKRUPTCY JUDGE

Appendix D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CASE NUMBER
A90-02881-ADK

IN THE MATTER OF:

THE RUSSELL CORPORATION,

Debtor,

RESOLUTION TRUST CORPORATION, as Conservator for First American Savings Bank, F.S.B.,

Movant,

v.

THE RUSSELL CORPORATION,

Respondent,

BARRON J. RUSSELL and NANCY H. RUSSELL,

Intervenors.

IN PROCEEDINGS UNDER CHAPTER 11
OF THE BANKRUPTCY CODE

ORDER

In accordance with the reasoning contained in the accompanying Memorandum of Opinion,

IT IS THE ORDER OF THE COURT that the Motion to

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Intervene filed by Barron J. and Nancy H. Russell be, and the same hereby is, GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motion for Relief From the Automatic Stay filed by Resolution Trust Corporation, as Conservator for First American Savings Bank, F.S.B., be, and the same hereby is, GRANTED. The automatic stay is hereby ANNULLED effective December 30, 1992 to permit Resolution Trust Corporation, as Conservator for First Savings Bank, F.S.B. to file a confirmation action in the Superior Court of Gwinnett County, Georgia.

The Clerk is hereby directed to serve a copy of this Order and the accompanying Memorandum of Opinion on the Debtor, attorney for Debtor, attorney for Movant, attorney for Intervenors, and attorney for Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia, this 25th day of June, 1993.

s/ A. D. Kahn
A. D. KAHN
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX E — ORDER (UNPUBLISHED DECISION) OF *IN RE MAITLAND GROVE, INC.*, CASE NO. A90-15732, (BANK. N.D. GA.) FILED JANUARY 8, 1992

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CHAPTER 11

CASE NO. A90-15732

IN RE:

MAITLAND GROVE, INC.,

Debtor.

FIRST UNION NATIONAL BANK OF GEORGIA,

Movant,

v.

MAITLAND GROVE, INC.

Respondent.

CONTESTED MATTER

ORDER

This matter is before the court on Debtor's motion for contempt and imposition of sanctions and on the motion of First Union National Bank of Georgia ("FUNB") for relief from the automatic stay. Hearing was held August 21, 1991. For the

reasons set forth below, FUNB is held to have violated the automatic stay and sanctions in the amount of $5,000 are imposed, payable to Debtor. Additionally, FUNB's motion for retroactive relief from the stay is granted.

The above-styled case commenced November 6, 1990. Debtor's sole asset was a partially developed tract of real property located in DeKalb County, Georgia (the "Property"). The Property secured a loan from FUNB in the original principal amount of $2.25 million.[1] Mr. Patrick St. E. Rodgers, Debtor's president, sole director, and sole shareholder, personally guaranteed the debt to FUNB.

An order was entered March 18, 1991, which provided that FUNB could begin advertising the Property for foreclosure during the month of April, 1991, for foreclosure in May, 1991. The order also provided, however, that if Debtor presented satisfactory evidence to FUNB of Debtor's ability to sell or refinance the Property, FUNB could delay foreclosure, continue advertising during the month of May for foreclosure in June, 1991. The order also provided that if the June foreclosure day occurred without FUNB having received payment from Debtor,[2] then FUNB "may foreclose upon the property."

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1. This is the amount set forth in the security deed modified by a supplemental loan agreement between Debtor and FUNB executed November 3, 1989. The original note and security deed executed December 15, 1988, set forth the amount of the loan as $1.95 million. A second note in the amount of $300,000.00, a supplemental loan agreement and modified security deed were executed November 3, 1989.

2. The order provided that Debtor and FUNB may settle their claims by payment from Debtor to FUNB of $1.7 million.

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FUNB delayed foreclosure until June, 1991, but when payment was not received from Debtor, FUNB foreclosed June 4, 1991. FUNB purchased the Property at the foreclosure sale for $1.7 million.[3] Thus, $550,000.00 of FUNB's claim remains unsatisfied.

On June 26, 1991, FUNB filed in DeKalb County Superior Court an application for confirmation of the foreclosure sale.[4] The confirmation proceeding is styled *First Union National Bank v. Maitland Grove Inc. and Patrick St. E. Rodgers.*[5] On June 27, 1991, FUNB's attorney contacted Debtor's attorney to request that Debtor's attorney acknowledge service of the summons. Debtor's attorney refused to acknowledge service and informed FUNB's attorney that Debtor contended the confirmation proceeding violated the automatic stay of 11 U.S.C. §362(a). Written notice of Debtor's contentions were sent July 1, 1991.

FUNB took no action to withdraw the confirmation proceeding or to obtain relief from the automatic stay. On July 12, 1991, Debtor filed its motion for contempt and sanctions.[6] FUNB

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3. FUNB subsequently resold the Property for $1.1 million.

4. Confirmation by the Superior Court that the foreclosure sale brought reasonable market value of the property is a prerequisite to obtaining a deficiency judgment.

5. DeKalb County Superior Court Civil Action Number 91-6892-2.

6. Section 362(h) provides, "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages." It has been held that §362(h) provides a legal basis for sanctions only when the party harmed by a violation of the automatic stay is a person rather than an artificial entity (Cont'd)

filed its motion for relief from stay July 15, 1991. In the motion for relief from stay, FUNB states that it waives any right to pursue Debtor to satisfy FUNB's deficiency claim; FUNB seeks to pursue only Patrick St. E. Rodgers on his personal guarantee.

The decision to file the confirmation proceeding was made by attorneys in the firm of FUNB's bankruptcy attorney. Those attorneys apparently specialized in real property law and believed that confirmation was attendant to foreclosure and did not violate the automatic stay of 11 U.S.C. §362(a). FUNB's bankruptcy attorney was neither consulted nor made aware of the filing of the confirmation proceeding until approximately July 8, 1991. At that time, FUNB's bankruptcy counsel advised that foreclosure and a confirmation proceeding were not attendant actions and advised that summons not issue against Debtor. FUNB's motion for relief from stay was filed shortly thereafter.

DISCUSSION

In the case of *Bank of America National Trust and Savings Association v. Virginia Hill Partners I*, 110 B.R. 84 (Bankr. N.D. Ga. 1989), Judge Cotton held, on facts very similar to those in the instant case, that a proceeding to confirm a foreclosure sale

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(Cont'd)

such as a corporation or a partnership. *In re Chateaugay Corp.*, 920 F. 2d 183 (2d Cir. 1990). Other courts, however, hold that §362(h) applies as to a corporate debtor as well as in that of an individual. *Budget Service Co. v. Better Homes of Virginia Inc.*, 804 F. 2d 289 (4th Cir. 1986); *In re Atlantic Business and Community Corp.*, 901 F. 2d 325 (3rd Cir. 1990); *In re Randy Homes Corp.*, 84 B.R. 799 (Bankr. M.D. Fla. 1988). Assuming that §362(h) does not apply to debtors other than individuals, the bankruptcy court may punish willful violations of the automatic stay pursuant to 11 U.S.C. §105. *In re Jim Nolker Chevrolet-Buick-Oldsmobile Inc.*, 21 B.C.B. 26 (Bankr. W.D. Mo. 1990).

violates the automatic stay of 11 U.S.C. §362(a). In the instant case, FUNB argues that the *Virginia Hill* case was wrongly decided.[7]

FUNB contends that the *Virginia Hill* court incorrectly relied upon the case of *Weems v. McCloud*, 619 F. 2d 1081 (5th Cir. 1981),[8] rather than the case of *Jonesboro Investment Trust Assn. v. Donnelly*, 141 Ga. App. 780, 234 S.E. 2d 349 (1977). The *Jonesboro* case, decided under the Bankruptcy Act, determined that a confirmation proceeding was not a proceeding stayed by the injunction obtained from the bankruptcy court by the debtor nor was it a proceeding stayed by the stay contained in Bankruptcy Rule 11-44. The *Weems* case determined that a confirmation proceeding was a proceeding within the meaning of 12 U.S.C. §1819. Both cases were argued in the *Virginia Hill* case. Judge Cotton concluded that the *Weems* case was binding precedent; he rejected the characterization of a confirmation proceeding set forth in the *Jonesboro* case as not binding in federal court. The reliance in the *Virginia Hill* case on the Fifth Circuit precedent is reasonable and persuasive. FUNB's argument that such reliance is incorrect is without merit.

FUNB asserts another argument which was addressed in the *Virginia Hill* case: the confirmation proceeding, which occurred postpetition, is not a proceeding which "could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the

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7. FUNB also seeks to distinguish the facts of the *Virginia Hill* case from those in the instant case. The facts which differ between the two cases, however, would not affect the legal analysis set forth in the *Virginia Hill* case.

8. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

commencement of the case under this title." 11 U.S.C. §362(a)(1). The *Virginia Hill* case dispensed with this argument in a single sentence: "Because the Bank of America's claim and contract rights arose before the filing of the petition, the court finds and concludes that this is an action to which the §362(a)(1) automatic stay applies." FUNB characterizes this statement as "no meaningful analysis." Analysis of the obvious, however, is usually unnecessary. A determination reached in a confirmation proceeding does not give rise to an independent claim against Debtor or a guarantor. Any deficiency judgment which naturally followed the confirmation proceeding would of necessity be based upon the creditor's prepetition claim. FUNB's argument is without merit.

Therefore, a confirmation proceeding in Georgia is a "proceeding" within the meaning of §362(a) and such proceeding was filed against Debtor to recover a prepetition claim. Therefore, the commencement of the confirmation proceeding violated the automatic stay of 11 U.S.C. §362(a). FUNB's belated assertion that it waives any right to proceed against Debtor but seeks only to proceed against the guarantor does not retroactively cure the violation of the stay.

In the *Virginia Hill* case, Judge Cotton concluded that, as a result of the uncertain state of the law with respect to whether a confirmation proceeding violates the automatic stay, the creditor's violation was technical but not willful. As a result no sanctions were imposed. In the instant case, however, the *Virginia Hill* case was extant at the time the decision to file the confirmation proceeding was made. As a consequence, FUNB and its attorneys should have known relief from the automatic stay was necessary and had sufficient time to obtain such relief.

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It has been the experience of the undersigned that real estate attorneys frequently make assumptions about the state of bankruptcy law without performing the appropriate legal research or consulting with bankruptcy experts. Such appears to have occurred in the instant case, as FUNB's bankruptcy attorney was not even made aware that the confirmation proceeding had been filed until almost three weeks after such filing and after Debtor's attorney had asserted its position that such filing violated the automatic stay. Accordingly, sanctions in the amount of $5,000.00, payable to Debtor, are appropriate.

FUNB has requested in its post-hearing brief retroactive relief from the automatic stay to validate the confirmation proceeding filed June 26, 1991. Debtor opposes the motion on the following grounds: (1) FUNB's original motion did not request retroactive relief from the stay; (2) relief from the stay, even with the proviso that FUNB would not seek a deficiency judgment against Debtor, would harm Debtor; Debtor's principal, who is also guarantor of the debt to FUNB and is the party against whom FUNB will seek a deficiency judgment, is unable to fund both a defense to the confirmation proceeding and the litigation which is Debtor's only remaining asset;[9] and (3) where annulment of the automatic stay is allowed the proponent of the annulment made a showing of bad faith by the debtor.

The liberal pleading rules in Bankruptcy Rule 7001, *et seq.*,[10] especially, Bankruptcy Rule 7015, overcome Debtor's assertion

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9. The litigation which Debtor contemplates and upon which Debtor's amended plan is based would be filed against the lender from whom Debtor had obtained a commitment to refinance the Property, which commitment was withdrawn, resulting in the foreclosure of the Property by FUNB.

10. Made applicable to contested matters by Bankruptcy Rule 9014.

that FUNB cannot receive retroactive relief not requested in the original motion for relief from stay. The issue of retroactive relief was raised at the hearing and was specifically requested in FUNB's post-hearing brief. Annulment of the automatic stay, which provides the type of retroactive relief FUNB seeks, is authorized in §362(d).

Debtor's assertion of harm to Debtor which will result if action against Debtor's principal is allowed to proceed is without merit. Proceedings against third parties other than Debtor are not stayed by §362. An injunction against such proceedings, however, may be available pursuant to 11 U.S.C. §105. *Otero Mills, Inc. v. Security Bank & Trust*, 25 B.R. 1018 (D. New Mex. 1982). Debtor has not, however, filed a complaint, as required by Bankruptcy Rule 7001, to obtain such an injunction. Additionally, even if the procedural omissions were overlooked, Debtor has failed to establish the elements necessary to show that proceedings against Mr. Rodgers should be enjoined. Debtor's request to deny relief from the stay so as to protect Debtor's principal is without merit.

Although the case law in which annulment of the stay is allowed usually involves a showing of bad faith by the debtor, §362(d) includes no such requirement. To obtain relief, a creditor need only show cause. The facts necessary to establish cause and the type of action appropriate to accord a creditor relief is within the discretion of the bankruptcy court as a court of equity.

In the instant case, the Property is no longer property of the estate. Debtor has no assets except an unliquidated, contingent claim for relief against a lender. FUNB has waived its right to seek any adjudication of liability against Debtor. An action taken in violation of the automatic stay is void. *Borg-Warner*

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Acceptance Corp. v. Hall, 685 F. 2d 1306 (11th Cir. 1982). Refusal to confer retroaction relief upon FUNB could result in a prohibition against refiling as a result of expiration of the statute of limitations. Therefore, retroactive relief from the stay is appropriate. Accordingly, it is hereby

ORDERED that Debtor's motion for contempt and imposition of sanctions is granted: FUNB is held to have violated the automatic stay and sanctions in the amount of $5,000 are imposed, payable to Debtor. It is further

ORDERED that FUNB's motion for retroactive relief from the stay is granted. The automatic stay is annulled effective June 26, 1991, to permit FUNB to file a confirmation proceeding in DeKalb County Superior Court.

IT IS SO ORDERED, this 6th day of January, 1992.

s/ Margaret H. Murphy
MARGARET H. MURPHY
UNITED STATES
BANKRUPTCY JUDGE

Supreme Court, U.S.
FILED
APR 2 1996
CLERK

No. 95-1099

In the Supreme Court of the United States

OCTOBER TERM, 1995

BARRON J. RUSSELL AND NANCY H. RUSSELL,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the bankruptcy court acted within its discretion under 11 U.S.C. 362(d) in retroactively annulling an automatic stay, where the debtor did not object to annulment and annulling the stay would not affect the debtor's estate.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1099

BARRON J. RUSSELL AND NANCY H. RUSSELL,
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v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is unpublished, but the decision is noted at 62 F.3d 401 (Table). The order of the district court (Pet. App. 5a-7a) is unreported. The memorandum and order of the bankruptcy court (Pet. App. 8a-17a) are reported at 156 B.R. 347.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1995. A petition for rehearing was denied on September 6, 1995. Pet. App. 1a-2a. On November 22, 1995, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and

including January 5, 1996, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, the Russell Corporation (Russell) filed a petition for relief under Chapter 11 of the Bankruptcy Code. Pet. App. 9a. At the time the petition was filed, Russell owed to First American Savings Bank, F.S.B. (First American) a debt that was secured by a mortgage on property owned by Russell and by the personal guaranty of petitioners. *Ibid.* First American moved for relief from the automatic stay. *Ibid.* As a result of that motion, a consent order was entered that required strict compliance with Russell's obligation to make payments to First American. *Ibid.* After Russell defaulted under the terms of the consent order, the bankruptcy court entered an order granting First American relief from the automatic stay. That order provided, in pertinent part:

> First American Savings is granted relief from the automatic stay with respect to the property securing its claim * * * to advertise, foreclose upon and to exercise all other remedies with respect to said property to which it is entitled under applicable law.

Id. at 10a.

2. On June 5, 1992, the Resolution Trust Corporation (RTC) was appointed receiver for First American and conservator for First American Federal Savings Bank (First American Federal), the successor to First American. Gov't C.A. Br. 5 n.1. The RTC foreclosed on Russell's property on December 1, 1992, and was the high bidder at the foreclosure sale.

Pet. App. 10a. The RTC then filed an action to confirm the sale in the Superior Court of Gwinnett County, Georgia (the confirmation action). *Ibid.*[1] The confirmation action named as respondents both Russell and petitioners, but the RTC stated that it had named Russell only in order to comply with Georgia law, and that it did not intend to seek a deficiency judgment against the debtor. *Id.* at 11a. Upon petitioners' objection, the state court stayed its proceedings and directed the RTC to seek relief from the automatic stay in the bankruptcy court. *Id.* at 10a. The RTC moved for relief from the stay, *nunc pro tunc*, and the bankruptcy court allowed petitioners to intervene in opposition. *Id.* at 9a, 12a.

3. The bankruptcy court held that the filing of the confirmation action violated the automatic stay. Pet. App. 14a. The court went on to hold, however, that 11 U.S.C. 362 authorizes courts to grant retroactive relief from the automatic stay, and that such relief was appropriate in this case. Pet App. 14a. The court reasoned that the automatic stay was designed, not to benefit third parties like petitioners, but to protect the debtor and the property of the estate. *Ibid.* Because the RTC was not seeking a deficiency judgment against the debtor, and because the debtor's trustee did not object to the retroactive annulment of the stay, the court found that only petitioners would benefit from enforcement of the stay, by avoiding their liability as guarantors. *Id.* at 15a. Concluding that Section 362 was not intended to foster that result, the court granted the RTC's motion for retroactive relief from the automatic stay. Pet App. 15a.

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[1] Under Georgia law, a confirmation action is a prerequisite to obtaining a deficiency judgment. See Pet. App. 13a.

4. The district court affirmed. Pet. App. 7a. The court agreed that Section 362 permits retroactive relief from the automatic stay. It further held that, because Congress intended the automatic stay to protect debtors, and not to allow solvent guarantors to avoid their obligations, the relief granted by the bankruptcy court was appropriate. Pet App. 7a.

5. The court of appeals affirmed in a per curiam order for the reasons stated by the bankruptcy and district courts. Pet. App 4a.

ARGUMENT

Petitioners urge this Court (Pet. 5-7) to grant certiorari in order to resolve a conflict among the circuits concerning whether actions taken in violation of the automatic stay provided in 11 U.S.C. 362 are void *ab initio*, or merely voidable. That question, however, did not control the outcome in this case. While courts have frequently articulated the general proposition that actions violating the automatic stay are "void," they have consistently gone on to hold that bankruptcy courts have the discretion to validate such actions, in appropriate cases, by retroactive annulment of the stay. See, *e.g.*, *In re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994) ("Pursuant to section 362(d), the bankruptcy court had authority to grant an annulment of the stay. If it had done so, the post-petition sheriff's sale would have been validated as an exception to the void *ab initio* rule."); *In re Schwartz*, 954 F.2d 569, 571-572 (9th Cir. 1992) (finding violations of the automatic stay to be "void, not voidable," but concluding that "section 362 gives the bankruptcy court wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from the stay"); *In re Albany Partners, Ltd.*,

749 F.2d 670, 675 (11th Cir. 1984) ("It is true that acts taken in violation of the automatic stay are generally deemed void and without effect. Nonetheless, § 362(d) expressly grants bankruptcy courts the option, in fashioning appropriate relief, of 'annulling' the automatic stay, in addition to merely 'terminating' it.") (citations omitted).[2] See also 2 L. King, *Collier on Bankruptcy* ¶ 362.07 (15th ed. 1995). Because the bankruptcy court granted retroactive annulment in this case, the relevant question is whether the court of appeals properly affirmed the bankruptcy court's exercise of its discretion.

Petitioners are correct in suggesting (Pet. 7-8, 10) that the most commonly cited basis for annulment—a creditor's lack of awareness of the automatic stay—is absent here. They are mistaken, however, in contending (Pet. 8-11) that no other equitable basis supports the decision below. The bankruptcy court invoked its equitable powers to grant relief, *nunc pro tunc*, in this case because retroactive annulment would not affect the debtor's estate, and because enforcing the stay would have served only to relieve petitioners of their guaranty obligations. Pet. App. 15a.[3] Petitioners cite no case, and we are aware of

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[2] Petitioners' contention (Pet. 5) that the decision below is inconsistent with the Eleventh Circuit's prior decision in *Albany Partners* does not merit further review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (intracircuit conflict does not generally warrant Supreme Court review because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties").

[3] Petitioners' reliance (Pet. 9) on *Franklin Savings Ass'n* v. *Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994), is misplaced. In *Franklin Savings Ass'n*, the creditor sought relief from the automatic stay in order to pursue a claim of court

none, in which a court has concluded that such considerations cannot support annulment of an automatic stay.

Petitioners demand, in essence, that the RTC's rights against them be denied as a sanction for violating the stay. Pet. 10. The district court correctly rejected that argument, holding that "[petitioners'] nebulous allegations of RTC misconduct do not undermine the logic" of the bankruptcy court's decision. Pet. App. 7a. Petitioners have no right to the protection of the automatic stay because their claim for relief lies far outside the zone of interests that Congress intended Section 362 to protect. See, *e.g.*, *Otoe County Nat'l Bank* v. *W & P Trucking, Inc.*, 754 F.2d 881, 883 (10th Cir. 1985) (automatic stay does not extend to guarantor of debtor); *In re Veeco Investment Co.*, 157 B.R. 452 (E.D. Mo. 1993) (bankruptcy court would not use its equitable powers to benefit guarantor of debtor); *In re Tulane Hotel Investors Ltd. Partnership*, 82 B.R. 826, 828 (E.D. La. 1988) (stay provisions are for benefit of debtor; nullification of state court judgment would neither benefit debtor's estate nor further purposes of Bankruptcy Code).

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costs against the debtor. *Id.* at 1022. Thus, unlike in this case, retroactive relief from the automatic stay would have adversely affected the debtor's estate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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